



**Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington DC 20515**

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September 18, 2020

SUMMARY OF SUBJECT MATTER

TO: Members, Committee on Transportation and Infrastructure

FROM: Staff, Committee on Transportation and Infrastructure

SUBJECT: Hearing on “Driving Equity: The U.S. Department of Transportation’s Disadvantaged Business Enterprise Program”

Purpose of Hearing

The Committee on Transportation and Infrastructure will meet on Wednesday, September 23, 2020, at 10:00 am, in room 2167 Rayburn House Office Building and remotely via Cisco WebEx, to receive testimony regarding “Driving Equity: The U.S. Department of Transportation’s Disadvantaged Business Enterprise Program.” The Committee will hear from representatives of the Virginia Department of Transportation; Broward County, Florida, Office of Small Business and Economic Development; the Airport Minority Advisory Council (AMAC); the Conference of Minority Transportation Officials (COMTO); Emerald Consulting Services; NERA Economic Consulting; and the American Council of Engineering Companies (ACEC).

Background

The U.S. Department of Transportation’s (DOT) Disadvantaged Business Enterprise (DBE) Program was established to remedy discrimination against minority and women-owned businesses.¹ The DBE program seeks to ensure those businesses are provided equal opportunities to compete for contracts assisted by certain DOT funds administered by the Federal Highway Administration

¹ DOT Office of Civil Rights. *Disadvantaged Business Enterprise (DBE) Program*. US Department of Transportation. Retrieved September 18, 2020, from <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>

(FHWA), the Federal Aviation Administration (FAA), the Federal Transit Administration (FTA), and the National Highway Traffic Safety Administration (NHTSA).²

First established by Federal regulation in 1980 as a minority and women's business enterprise program, the DBE program was later statutorily authorized for surface transportation programs in 1983 by the *Surface Transportation Assistance Act of 1982* (P.L. 97-424) to aid small businesses owned and controlled by minorities facing historic and continuing discriminatory barriers to participation in the highways and transit programs.³

DBE programs for women-owned businesses and the FAA's airport DBE program were primarily implemented by regulation until Congress passed the *Surface Transportation and Uniform Relocation Assistance Act of 1987* (P.L. 100-17) and the *Airport and Airway Safety and Capacity Expansion Act of 1987* (P.L. 100-223), which expanded statutory authorization for surface and airport transportation construction DBE programs to include women-controlled small businesses and codified the airport DBE program, respectively. The *Airport and Airway Safety and Capacity Expansion Act* also established a separate Airport Concession Disadvantaged Business Enterprise (ACDBE) Program administered by the FAA for airport concessions and related contracts.⁴ Since P.L. 100-223 codified the airport construction DBE program and the ACBDE program, these programs do not require statutory reauthorization in the same manner as surface transportation DBE programs.

Though not codified like the airport programs, Congress has regularly reauthorized the DBE program for highways and transit in successive surface transportation bills, most recently with the enactment of the *Fixing America's Surface Transportation (FAST) Act* (P.L. 114-94). In addition, the U.S. House of Representatives passed H.R. 2, the *Moving Forward Act*, which aims to reauthorize the surface DBE program with some amendments.

Both the surface DBE program and the aviation construction DBE program are implemented pursuant to regulations established under 49 CFR part 26. The ACDBE program is implemented pursuant to regulations established under 49 CFR part 23.

I. What is a DBE?

For eligibility purposes, a DBE is defined as a small, for-profit business where socially and economically disadvantaged individuals (1) own at least 51 percent of the economic interests of the entity, and (2) control and manage the business operations of the firm.⁵ A firm and its minority and/or women owners seeking certification as a DBE must meet: (1) an ownership and control test, (2) a personal net worth test, and (3) a size standard test, requirements for which are described in regulation.⁶

To be regarded as socially disadvantaged means to face historic and ongoing discrimination, such as racial or ethnic prejudice or cultural bias due to membership in a particular group.⁷

² 49 CFR 26.3.

³ DOT Office of Civil Rights. *Disadvantaged Business Enterprise (DBE) Program*.

⁴ *Id.*

⁵ 49 CFR 26.5.

⁶ 49 CFR 26; 49 CFR 23.

⁷ 13 CFR 124.103.

Consistent with DOT implementing regulations, minorities and women are presumed to be socially disadvantaged (although that presumption is rebuttable).⁸ Others may qualify as socially disadvantaged on a case-by-case basis.⁹

To be regarded as economically disadvantaged, an individual must, among other things, have a personal net worth that does not exceed \$1.32 million, excluding the equity in the individual's primary residence and the value of their ownership interest in the firm seeking certification.¹⁰

To meet size standards for DBE eligibility and be regarded as a small business in the surface transportation sector, a business must meet the qualifications of a small business defined by the Small Business Administration (SBA) in accordance with the North American Industry Classification System (NAICS) codes relevant to the business and as defined by the annual gross receipts or employee number caps outlined for each industry code.¹¹ In addition, the small business must not have average annual gross receipts over the firm's previous three fiscal years in excess of \$23.98 million, regardless of the relevant NAICS code qualification.¹²

Until the *FAA Reauthorization Act of 2018* (P.L. 115-254), size standards for DBE eligibility in the aviation construction sector reflected the same requirements as the surface DBE program. With that Act, however, Congress removed the separate \$23.98 million gross receipts cap requirement for businesses in the aviation construction sector, tying eligibility requirements directly to the SBA's definitions of small businesses.¹³

In addition, H.R. 2, the *Moving Forward Act*, proposes to remove the \$23.98 million gross receipts cap from the surface transportation DBE program as well, so the SBA would determine business size standards for DBEs. This proposed change would result in a uniform standard for determining small business size for both the surface and aviation construction DBE programs, set by the SBA.

To be certified under the FAA's ACDBE program, a business must meet different size standards reflective of the diversity of industries present in airport concessions.¹⁴

II. How are firms certified?

Recipients of DOT financial assistance (such as state departments of transportation, local governments, transit agencies, and port authorities) are required to establish a Unified Certification Program (UCP) in their state.¹⁵ The purpose of a UCP is to ensure DBEs and applicants (including airport concessionaires) will have "one-stop shopping" on all certification matters with respect to these recipients. If a business wants to be certified as a DBE, it must submit an application to the state UCP for approval.¹⁶ Determinations as to whether a firm meets the DBE criteria are made by

⁸ 49 CFR 26.67(a) and (b).

⁹ 49 CFR 26.67(d).

¹⁰ 49 CFR 26.67(a).

¹¹ 49 CFR 26.65(a).

¹² 49 CFR 26.65(b).

¹³ 49 USC §47113(a)(1).

¹⁴ 49 CFR 23.33.

¹⁵ 49 CFR 26.81.

¹⁶ *Id.*

the UCP using various means, including on-site visits, personal interviews, reviews of licenses, stock ownership, equipment, bonding capacity, work completed, résumé of principal owners, financial capacity, and type of work preferred.¹⁷ Once a DBE is certified through the UCP, that certification must be honored by all recipients of DOT funds within the state.¹⁸

While some state UCPs maintain certification reciprocity agreements with other state UCPs, each state exercises its own discretion as to whether it will accept certification from other states.¹⁹ DBEs wishing to do business in multiple states must generally recertify with all applicable UCPs.²⁰

III. How does the DBE program work?

Under the authorizing statutes for the various DBE programs, Congress set a national 10 percent participation goal for firms certified as DBEs in surface transportation programs, in airport federally assisted contracting (i.e., procurement, construction, or professional services contracts), and in airport concessions.²¹

DOT regulations require recipients of federal financial assistance that anticipate awarding prime contracts of more than \$250,000 to establish an annual aspirational DBE participation goal that reflects what DBE participation in federally-assisted projects would look like in the absence of discrimination.²² Recipients must base their goals on how to achieve a level playing field in their individual programs, regardless of the 10 percent national goal.²³ These goals must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to the DOT-assisted contracts that will be available that fiscal year (FY).²⁴

The two-step process for goal-setting in accordance with this demonstrable evidence is laid out in 49 CFR 26.45. Demonstrable evidence may come from several sources, including, but not limited to: census data, established DBE directories, past bidder lists, determinations by other DOT recipients with substantially similar market areas, and statistical DBE availability and disparity studies covering recipients' market areas.²⁵ The recipient of DOT funds must establish its goal for a three-year period and submit that goal with the determining methodology to the FAA, FHWA, or FTA for review and approval.²⁶

It is important to note that a recipient's goal is aspirational only; quotas and set-asides are generally not permitted. In addition, DOT does not assess penalties for not meeting DBE goals as long as good faith efforts are demonstrably made.²⁷ Furthermore, recipients are required to use race-neutral means to meet as much of their overall goal as possible (in this context, "race-neutral" refers

¹⁷ 49 CFR 26.83(c).

¹⁸ 49 CFR 26.81(b).

¹⁹ 49 CFR 26.81(e) and (f).

²⁰ 49 CFR 26.85.

²¹ See P.L. 114-94 §1101(b)(3) for surface, and 49 USC §47113(b) for aviation.

²² 49 CFR 26.21(a)(1) requires all FHWA "primary recipients" of Federal financial assistance to establish a DBE program, regardless of contract size. Subrecipients are governed by the prime recipient's DBE program.

²³ 49 CFR 26.45(b).

²⁴ 49 CFR 26.45.

²⁵ 49 CFR 26.45.

²⁶ *Id.*

²⁷ 49 CFR 26.47.

to both race and gender, i.e., without application of any criteria favoring DBEs over non-DBEs).²⁸ Examples of “race-neutral means” include: providing assistance to small businesses in overcoming issues such as the inability to obtain bonding or financing; unbundling large contracts to make them more accessible to small businesses; informational and communication programs on contracting procedures and specific contract opportunities; and other business support services.²⁹

If a recipient is unable to meet its overall DBE participation goal through race-neutral means, then a recipient must establish contract goals (which are deemed race-conscious) for DBE participation.³⁰ This means the recipient has determined that, without the use of race-conscious measures, a level playing field for DBE businesses could not be achieved. Contract goals require that prime contractors employed by DOT recipients make good-faith efforts to award a certain percentage of their total contract work to certified DBEs in order to meet the race-conscious portion of their overall DBE participation goal.³¹ There are no Federally-mandated penalties for failing to meet these goals as long as good-faith efforts are made.

Importantly, as discussed further in section VI below, states under the jurisdiction of the Ninth Circuit Court of Appeals must use evidence from statistical disparity studies during their goal-setting process before DOT recipients in those states are allowed to set race-conscious goals for DBE participation.³²

V. What must recipients report to DOT modal administrations?

Recipients of DOT funds must maintain accurate records of data related to the participation of DBEs on projects and report these records regularly to DOT modal administrations.³³ FHWA and FTA recipients must submit a uniform report of DBE contract awards, commitments, and payments twice per FY, and FAA recipients must submit such a report once per FY.³⁴

These uniform reports break down awards, commitments, and payments of federal financial assistance in terms of, among other things: (1) number of contracts awarded to DBEs as a percentage of total contracts, (2) dollar amount of contracts awarded to DBEs as a percentage of total contract dollars, (3) a breakdown of number of contracts awarded to DBEs disaggregated by race, gender, or other applicable categories, and (4) a breakdown of contract dollar amounts awarded to DBEs disaggregated by race, gender, or other applicable categories.³⁵

VI. How has the DBE program been reviewed by the courts?

Numerous court cases dealing with the DOT’s DBE program or questions of race or gender-based discrimination have affected the implementation of the program over time. Some have involved the program directly and others indirectly. Below is a brief overview of a few of the most relevant cases.

²⁸ See 49 CFR 26.5 and 49 CFR 26.51.

²⁹ 49 CFR 26.51(b).

³⁰ 49 CFR 26.51(d).

³¹ 49 CFR 26.51(e)(2).

³² Case No. C00-5204 RBL (W.D. Wash. June 23, 2006)

³³ 49 CFR 26.11.

³⁴ *Id.*

³⁵ 49 CFR 26, Appendix B.

a. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)

In 1989, the United States Supreme Court held in *City of Richmond v. J.A. Croson Co.* (*Croson*) that a Richmond, Virginia, set-aside program giving preference to minority businesses in the awarding of municipal contracts was unconstitutional on the grounds that the city had failed to adequately demonstrate its compelling interest in establishing such a program on the basis of relevant, measurable evidence.³⁶ With this holding, the Court established an outline of what would constitute a permissible program for race-based awarding of public contracts by requiring that such programs be subject to a “strict scrutiny” standard (the most stringent standard) of judicial review.³⁷ Under the strict scrutiny standard, a public entity must prove: (1) that it has a “compelling interest” in remedying discrimination based on “a strong basis in evidence,” and (2) that the measures employed to remedy such discrimination are “narrowly tailored” to the scope of the evidence presented.³⁸

b. *Adarand v. Peña*, 515 U.S. 200 (1995)

In 1995, in *Adarand v. Peña* (*Adarand*), a case dealing with DOT funds expended in the state of Colorado, the United States Supreme Court held that the strict scrutiny standard previously applied in *Croson* applies to the Federal government in the establishment of race-based programs.³⁹ While the Court did not specifically determine the constitutionality of DOT’s DBE program in *Adarand*, the Administration undertook a review of Federal programs, including the DBE program, that used race or gender as a basis for decision-making to ensure compliance with the strict scrutiny standard.⁴⁰ In 1998, Congress reauthorized the surface DBE programs with the *Transportation Equity Act for the 21st Century* (TEA-21, P.L. 105-178). In 1999, the DOT finalized new rules for both the surface and aviation DBE programs to ensure compliance with *Adarand*, and new rules for the ACDBE program were issued in 2005.⁴¹ Since the new rules were adopted, courts considering the constitutionality of the DBE program have consistently upheld the program against facial challenges.⁴²

c. *Western States Paving Co., Inc. v. Washington State Department of Transportation*, Case No. C00-5204 RBL (*W.D. Wash.* June 23, 2006)

In 2005, the U.S. Court of Appeals for the Ninth Circuit decided in *Western States Paving Co., Inc. v. Washington State Department of Transportation* (*Western States*) that DOT’s DBE program was facially constitutional, however was unconstitutional “as applied” by Washington State’s DOT

³⁶ 488 U.S. 469 (1989).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 515 U.S. 200 (1995).

⁴⁰ See Affirmative Action Review Report to the President. Retrieved September 18, 2020, from <https://clintonwhitehouse2.archives.gov/WH/EOP/OP/html/aa/aa-index.html>

⁴¹ See 54 Fed. Reg. 5,096 (February 2, 1999), and 70 Fed. Reg. 14,496 (March 22, 2005)

⁴² See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), cert. granted, 532 U.S. 941, then dismissed as improvidently granted, 534 U.S. 103 (2001) (*Adarand VII*); *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, and *Gross Seed Co. v. Nebraska Department of Roads*, 345 F.3d. 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Western States Paving Co., Inc. v. Washington Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007) (*Northern Contracting III*); *Orion Insurance Group v. Washington OMWBE*, U.S. DOT, 2018 WL 6695345 (9th Cir. 2018), cert. denied, June 24, 2019.

(WashDOT), because WashDOT had failed to meet the strict scrutiny requirement that the program be narrowly tailored.⁴³ The court held WashDOT had not established with sufficient statistical evidence that it needed race-conscious measures to meet WashDOT's DBE participation goals.⁴⁴ In response to this ruling, the DOT advised all states within the jurisdiction of the Ninth Circuit Court to implement only race-neutral program goals until statistical disparity studies could be completed to meet strict scrutiny standards for race-conscious contracting goals.⁴⁵

VII. What are disparity studies and how do they identify discrimination in markets?

Disparity studies are complex statistical analyses of relevant marketplaces for Federal contracts. Study methodology can vary, but studies generally aim to present policymakers with a "disparity ratio," the relative percentage of Federal contract dollars awarded to minority groups and women in comparison with the percentage such groups would be expected to receive in a marketplace where discrimination is not present.⁴⁶ Disparity studies conducted for DOT funding recipients may include, among other factors, analysis such as: (1) an empirical determination of the appropriate market area and appropriate product markets relevant to the recipients contracting activity; (2) an estimate of the fraction of DBEs compared with non-DBEs in the relevant market area and product markets (DBE availability); (3) an estimate of the percentage of the recipient's contract dollars earned by DBEs (DBE utilization); (4) a statistical comparison of DBE availability and utilization; (5) econometric analysis of the relative success of DBEs in the recipients public sector market as well as the corresponding private sector market; and (6) econometric analysis of DBE access to capital in the relevant marketplace.

As noted, recipients of DOT funds may use, and recipients under the jurisdiction of the Ninth Circuit Court generally must use pursuant to *Western States*, statistical disparity studies to aid in the establishment of goals for DBE participation on Federal-aid contracts. Since the *Croson* decision, many public agencies across the country, including DOT funding recipients, have relied upon disparity studies to establish accurate, empirically-based goals for minority participation in public contracting programs, including the DOT's DBE program.

⁴³ Case No. C00-5204 RBL (W.D. Wash. June 23, 2006).

⁴⁴ *Id.*

⁴⁵ DOT Office of Civil Rights. *Western States Paving Company Case Q&A*. US Department of Transportation. Retrieved September 18, 2020 from <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/western-states-paving-company-case-q-and-a>

⁴⁶ National Academies of Sciences, Engineering, and Medicine, Transportation Research Board, & National Cooperative Highway Research Program. (2010). Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program. *The National Academies Press*. Retrieved September 18, 2020, from <https://www.nap.edu/catalog/14346/guidelines-for-conducting-a-disparity-and-availability-study-for-the-federal-dbe-program>

Witnesses

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